Meeting Date	**05 August 2021**	**Agenda Item**	**3.1**
Report Title	Update position on Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS), for Quarter 1, April to June 2021		
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Report Sponsor	Christine Williams, Interim Executive Director of Nursing		
Presented by	Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group		
Freedom of Information	Open		
Purpose of the Report	To provide an update and assurance around the management of Deprivation of Liberty Safeguards (DoLS), MCA update and Court of Protection Information.		
Key Issues	• DoLS performance in Quarter 1. • Update on COVID19 and ward visiting restrictions in relation to DoLS		
Specific Action Required ***(please choose one only)***	**Information** ☐	**Discussion** ☐	**Assurance** ☒ / **Approval** ☐
Recommendations	Members are asked to note: 1. Note the performance data for Quarter 1 – April to June 2021 (Appendix 1). 2. **Note that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.**		
Appendices	Appendix 1		

Update position on Deprivation of Liberty Safeguards and MCA

1. INTRODUCTION

The purpose of this report is to provide an update on Quarter 1 in relation to Deprivation of Liberty Safeguards (Appendix 1).

2. BACKGROUND

The Mental Capacity Act, Deprivation of Liberty Safeguards provides a legal framework to protect vulnerable adults**,** who may become, or are being deprived of their liberty in a care home or hospital setting**.** These safeguards are for people who lack capacity to decide where they need to reside to receive treatment and/or care and need to be deprived of their liberty, in their best interests**,** other than under the Mental Health Act 1983 (MCA Code of Practice). The safeguards came into force in Wales and England on the 1st April 2009.

The Mental Capacity Act 2005 (MCA) came into force in October 2007, SBU HB supports a significant number of patients with impaired decision-making, therefore this report aims to provide assurance of awareness and the use of MCA throughout the Health Board, via training and the use of the Independent Mental Capacity Advocacy Service (IMCAs).

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

In Q1 there were 257 referrals received, of those 42 were assessed by the 2 dedicated BIAs, as a result of the COVID 19 pandemic only 1 internal (not primary role) BIA's completed 4 assessments. The external BIAs assessed 20 resulting in 3 being granted (**Appendix 1**)

The external BIA's assessed 20 of which 3 were granted, with 8 awaiting completion for the period April to June 2021, of the 20 assessed 9 were not granted as patients were either discharged/not a deprivation or died.

Breaches are recorded in accordance with Welsh government guidance – the legislative time frame for assessors to complete the assessments does not start until 2nd assessor has been allocated - breach occurs if the urgent is not completed in 5 days of allocation; standard 21 days – we do not include 'breaches' between lapse of an urgent to point when standard is authorised.

It is important to note that figures for activity in each quarter will not equate as some assessments would have been received in the previous quarter, while some assessments whilst allocated will not be authorised until following quarter.

If the Heath Board is unable to undertake timely completion of DoLS authorisations the Health Board will be in breach of legislation and claims may be persued as a result.

This is noted both on the Copropate Risk Register and the PCT Group Risk Register with a score of 12.

The cumulative number of discharges from 1st April to 30th June 2021 equates to 22, (this figure includes discharges, death, further assessments, reviews of conditions, patients not meeting DoLS criteria therefore DoLS applications are stopped).

Although the number of breaches have risen again (60 in Q4, with 108 in Q1), most breaches are due to a continuing lack of BIA Assessors – both internal and external. From mid April the 2 internal BIA assessors have been accessing acute sites, appropriate risk assessments were undertaken prior to visiting the wards.

The existing plan was to reduce the reliance on the externally contracted BIA roles and use internal Health Board BIA's who are currently employed in substantive roles within Service Goups . This model has been challenging due to staffing pressures throughout the COVID period. The Service Groups have not been able to release staff particularly during winter pressures and the COVID 19 period. The internal BIAs were orignally allocated 2 days a month but have not been released to the Supervisory Body to deliver the required functions due to COVID-19. This has resulted in the Supervisory Body having to fund external BIA's, however, this is insufficient to deliver all assessments within the required time scales. Additonal Welsh Government funding was made available in Q4, this enabled additional BIA assessments to be undertaken out of hours, however identifying BIA's has been challenging.

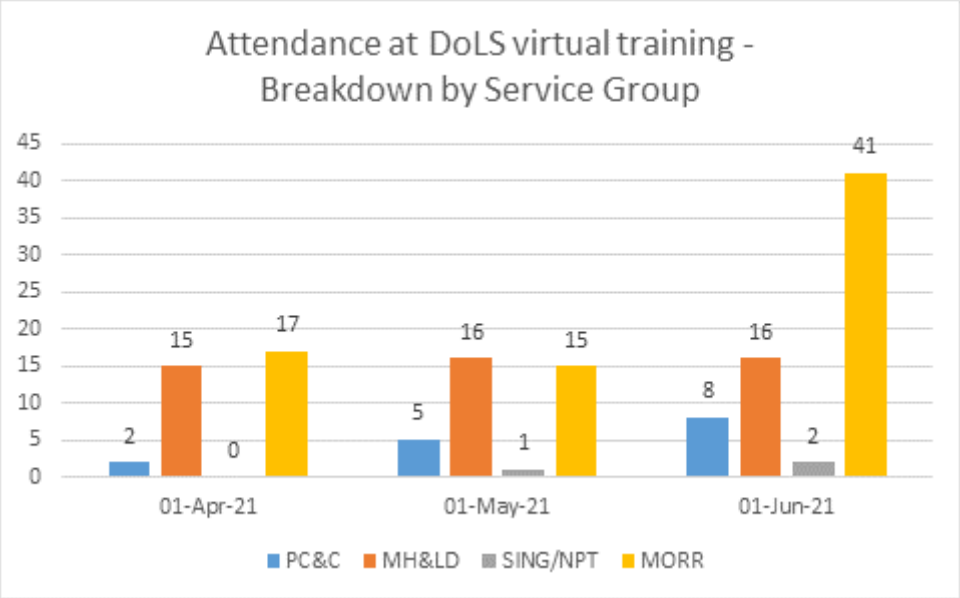
Discussions have taken place across the Health Board, around the need to develop a business case around DoLS and MCA, but the imminent move to LPS has superceded this and a paper outlining the requirements has been drafted and is currently being reviewed.

DoLS Training

DoLS training delivery is continuing via virtual platforms, and incorporates links between theory and practice in an aim to increase staff confidence and improve standards in practice.

Swansea University Health Law Department has developed and recorded a webinar to provide training on the application of DoLS in 16 and 17 year olds. This webinar can be accessed at any time and provides an additional resource for staff who may be involved with young people as part of their role. This training has been promoted via the Health Board intranet and can be accessed either through the Corporate Safeguarding SharePoint or the DoLS/MCA page.

Staff attendance at DoLS virtual training is demonstrated in the Table below.

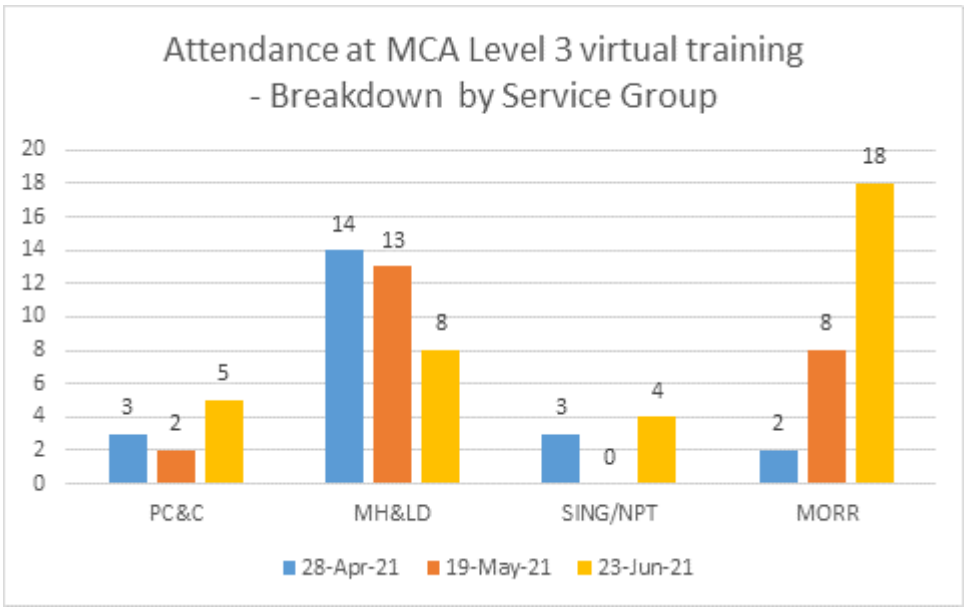


MCA Training

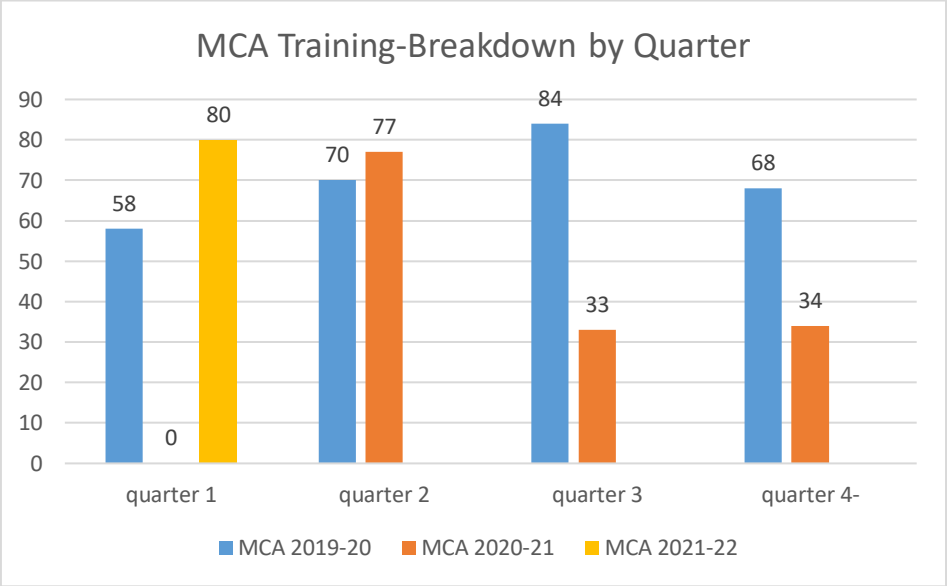
MCA Level 1 & 2 training is delivered as an e-learning package for all SBUHB staff. MCA Level 3 training is directed at ward managers, senior nurses and senior clinicians.

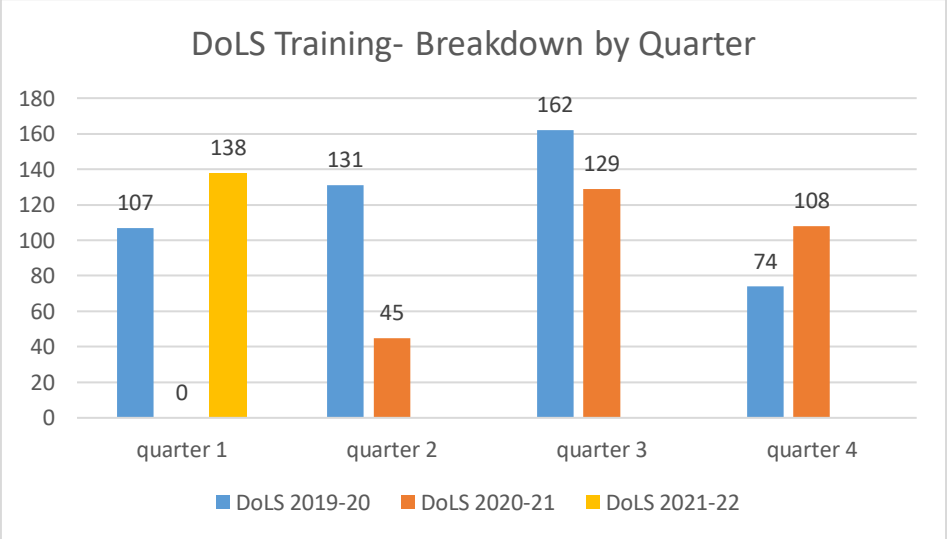
In addition to formal training, learning from Safeguarding cases, including MCA/DoLS, is disseminated widely across the Health Board. As with DoLS, MCA support continues to be provided by the BIAs within the Service Groups.

MCA Level 3 training continues to be delivered remotely via Microsoft Teams. The table below indicate training attendances during Quarter 1 reporting period.



The below tables show a comparison of training data for 2019/20, 2020/21 and 2021/22 across each Quarter. MCA Training compliance has been identified as an area that requires prioritising across all Service Groups. It is of note that there is a similar issue reported by all Health Boards across Wales, and it has been recommended nationally that MCA training is given priority, as MCA is imperative to underpinning the preparation for the transition to Liberty Protection Safeguards (LPS). A paper relating to LPS presented to the Safeguarding Committee in May 2021 highlighted this issue amongst others, to ensure LPS implementation remains a priority for the Health Board. In addition, the Corporate Safeguarding Team continue to complete Ward/Department Safeguarding Assurance Audits across all Service Groups. These Audits include all staff Safeguarding training compliance.

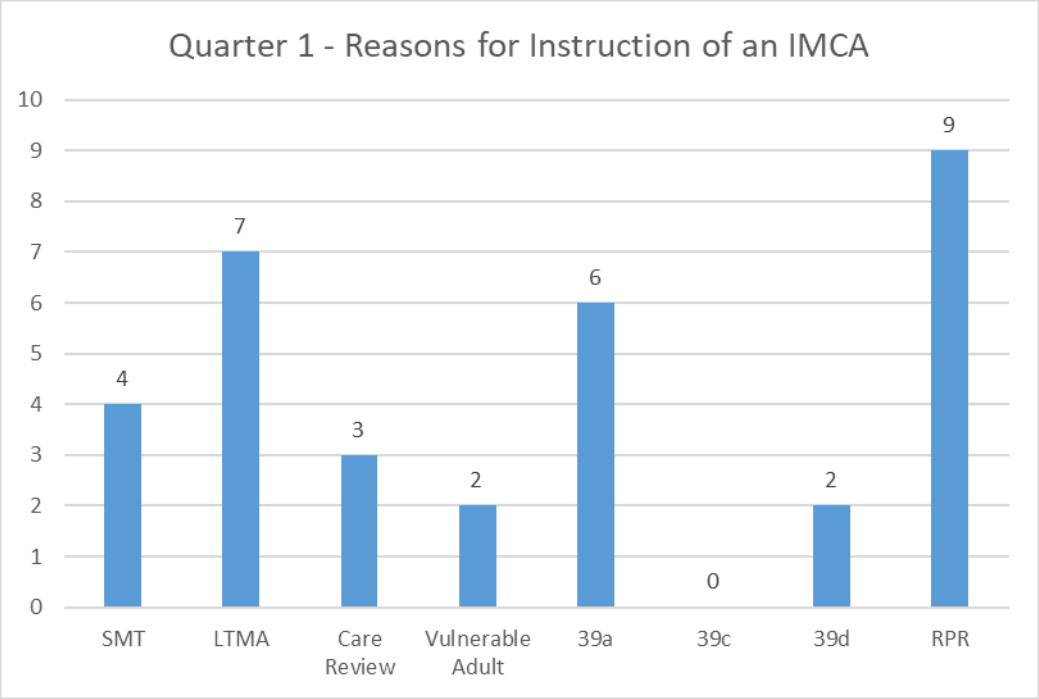




INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAs)

The Independent Mental Capacity Advocate (IMCA) service is a statutory service implemented in Wales 1st October 2007. IMCAs are independent advocates who represent people who lack capacity, in order to support them in making important decisions, which must comply with the MCA 2005. An IMCA must be appointed for anyone aged 16 or over who has been deemed as lacking capacity and are unfriended; they can also be appointed for Care Reviews or Adult Protection cases.

Mental Health Matters Wales provides the IMCA service for the Health Board and quarterly monitoring reports are provided. The below table indicates the number of new IMCA instructions from the Health Board during Quarter 1 together with the reasons for instruction.



Key
SMT = Serious Medical Treatment
LTMA = Long Term Move of Accommodation
39A = Where a request has been made for a Standard Authorisation, the 39A IMCA's role is to represent the person in the assessments to be carried out.
39C = Role can be understood as covering gaps in the appointments of relevant person's representatives. The role ends when another relevant person's representative is appointed.
39D = Only available when a standard authorisation is in place and the person has an unpaid relevant person's representative. Both the person who is deprived of liberty under a standard authorisation and their unpaid representative (RPR) have a statutory right of access to an IMCA.
RPR = Paid Relevant Person Representative where the assessors have not identified someone to represent the person.

The level of instructions for an IMCA for patients in SBUHB has remained consistent. The advocates are continuing to carry out their role using technology, in combination with meeting patients face-to-face where able whilst following government COVID-19 guidelines and local arrangements.

The IMCA quarterly monitoring reports continue to be shared via the Safeguarding Committee and include case scenarios.

COURT OF PROTECTION (CoP)

The Court of Protection (CoP) is a key decision making component of the Mental Capacity Act and has jurisdiction over property, financial affairs and the welfare of people who lack capacity. It has the same powers, rights, privileges and authority as the High Court. It was identified in late 2019 that links between the Corporate Safeguarding Team and the Legal Team have not been sufficiently robust to enable a regular oversight and assurance regarding Cop cases.

In January 2020 a Datix Change request was submitted to the Datix User Group meeting by the Mental Health & Learning Disabilities Delivery Unit to request an addition to the Complaints Module of Datix to enable capture of the Cop cases. This change has now been made and all Delivery Units have been notified. A new code 'type' has been added to the Complaints Module- 'Court of Protection'. This allows secure storage of documents and maintenance with a central oversight of Cop cases.

These records will be available and managed by the Service Delivery Groups with the ability to report on all cases on a Health Board wide basis.

Ongoing Identified Risks

COVID-19

There have been no adjustments to Mental Capacity Act and Deprivation of Liberty Safeguards Legislative responsibilities during COVID pandemic, any deprivation of liberty needs to be authorised. There are ongoing risks to the Health Board in relation to compliance with legislation:

- Lack of availability of assessors to undertake the assessments, particularly BIAs largely relying upon the two dedicated BIA's to undertake all assessments.
- Restrictions on visiting patients to carry out assessments.
- Limited ability to undertake remote assessments (lack of equipment and time for front line staff to support the patient with the assessment).
- There is a back log of cases awaiting assessment with 63 outstanding assessments, this is mainly as a result of the COVID restrictions, reduced footfall on the ward areas and BIA's not being released due to hospital pressures.

In view of COVID restrictions agreed processes are in place: -

- BIAs have been undertaking both remote and face-to-face assessments on the acute sites.
- A telephone triage and support service is available Monday to Friday 8am to 5pm.
- BIAs will work with staff in the acute settings to ensure robust care plans are in place to manage DoLs
- For patients with existing DoLS the review will be undertaken remotely where possible and the previous Section 12 Doctors report will be used.

- Admin support is still available.
- BIAs have been supporting acute staff with complex cases and to ensure patients are not delayed in hospital for concerns related to best interest decisions.

In addition:

- As part of triage BIAs have put in place 'traffic light' prioritisation for transparency and consistency.
- All guidance has been updated in line with government's updated guidance and widely circulated to relevant staff.

High Risk

- 1 of the 2 in-house BIAs, is leaving the organisation with effect from 3rd August 2021. There will be an impact on the day to day delivery of the current DoLS service and the introduction of the LPS service. A Vacancy Control form for a full time band 6 BIA fixed term contract (end March 2022) has been submitted.

Mental Capacity Act

MA compliance: Evidence of inconsistent understanding and implementation of MCA/DoLS across the service areas, our observations are that compliance and application is significantly better where ward leads have an interest in MCA/DoLS and have attended training or are BIA trained. In other areas there is a clear deficit where frontline staff are not confident or are lacking the skills and knowledge in undertaking mental capacity assessments and completing best interest meetings. This is a concern particularly for the future in relation to LPS as there is likely to be greater responsibilities on MA's when LPS is implemented.

Breaches – The actions taken to reduce breaches include encouraging MAs to submit a Form 1a (providing a further 7-day extension). COVID-19 has had an impact on the number of breaches, 75 breaches during Quarter 1, in addition to the lack of BIA resource.

Theme: There is a common misunderstanding that a patient has to have a DoLS authorisation in order for MAs to access additional support (1:1) or access support from onsite security services. This triggers inappropriate referrals and evidences the lack of knowledge and application of the use of the MCA without the need for DoLS. This issue has been addressed by providing staff and security services with additional training.

Liberty Protection Standards (LPS)

The date for the implementation of legislative changes moving from Deprivation of Liberty Safeguards to Liberty Protection Safeguards is planned for April 2022. The Health Board is awaiting further legislative guidance in order to support the transition from DoLSto LPS. Latest advice is that the LPS 'Code of Practice' is due for release for publication imminently (was due June 2021 but at time of writing has not yet been released with no definitive date given). In the interim MCA and DoLS will remain core

business, there has been no change to SBU HB's statutory obligations during the pandemic. Representatives from the DoLS Team and Corporate Safeguarding Team attend the NHS Wales Review of DoLS/MCA/LPS Network Task & Finish Group and dedicated workstreams that feed into to the Welsh Government National Steering Implementation Group.

FINANCIAL IMPLICATIONS

A review of SBUHB's service model compared to other Health Boards has shown a difference in how services are funded. Considering the similar level of referrals the comparison has highlighted that the level of funding and resource available for the SBUHB Supervisory Body is significantly lower than that of other HBs. This should remain under review in light of the implementation of LPS. In order for the Health Board to meet the new LPS legislative requirements a workforce review will need to be undertaken. In view of the preperations required and lead in time to LPS a new 8a lead role will be explored to ensure the Health Board can meet the new LPS and MCA legislative requirements.

5. RECOMMENDATIONS

Members are requested to:

1. Note the performance data for Qtr. 1 – April to June 2021 (Appendix 1).

2. Note that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.

Governance and Assurance		
Link to Enabling Objectives ***(please choose)***	**Supporting better health and wellbeing by actively promoting and empowering people to live well in resilient communities**	
	Partnerships for Improving Health and Wellbeing	☐
	Co-Production and Health Literacy	☐
	Digitally Enabled Health and Wellbeing	☐
	Deliver better care through excellent health and care services achieving the outcomes that matter most to people	
	Best Value Outcomes and High Quality Care	☐
	Partnerships for Care	☐
	Excellent Staff	☐
	Digitally Enabled Care	☐
	Outstanding Research, Innovation, Education and Learning	☐
Health and Care Standards		
(please choose)	Staying Healthy	☐
	Safe Care	☒
	Effective Care	☐
	Dignified Care	☐
	Timely Care	☐
	Individual Care	☒
	Staff and Resources	☐
Quality, Safety and Patient Experience		
Report highlights the importance of safe and timely assessment		
Financial Implications		
Report identifies the current financial challenges and lack of funding for Supervisory Body Function.		
Legal Implications (including equality and diversity assessment)		
Report reference the legal framework which is current and the future LPS implementation		
Staffing Implications		
Report outlines the current staffing capacity issues and identifies the potential for future staffing model to become compliant.		
Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)		
Report makes reference to future legislation.		
Report History	Presented to MHA&MCA Compliance Committee in August	
Appendices	**Appendix 1** provides performance information Q1.	